FILE COPY

CORRECTED COPY

Office-Supreme Court, U.S.
FILED
JAN 9 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. ~~947~~. 66

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102

COUDERT BROTHERS,
200 Park Avenue,
New York, New York 10017
Of Counsel.

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	11
A. The Court of Appeals Decision Is Clearly Correct in Applying the Protective Principles of the *New York Times* Case to the Broadcasts at Issue	11
B. There Is No Need for This Court to Review the Court of Appeals Decision That There Was No Constitutionally Sufficient Evidence of Actual Malice to Support a Judgment for Petitioner	17
CONCLUSION	20

TABLE OF CASES CITED.

Page

All Diet Food Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (N. Y. Sup. Ct. 1967) 14

Associated Press, Inc. v. Walker, 388 U. S. 130 (1967) 12, 13, 16, 18, 19

Beckley Newspapers v. Hanks, 389 U. S. 81 (1967) 19

Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969) 14

Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967) ..12, 13, 19

Farnsworth v. Tribune Company (Sup. Ct. of Ill.), decided November 26, 1969, No. 41699 14

Fotochrome, Inc. v. New York Herald Tribune, Inc., (Sup. Ct. of N. Y., Queens County, decided October 24, 1969, Index #12784/65) 14

Garrison v. Louisiana, 379 U. S. 64 (1964) 13, 19

New York Times v. Sullivan, 376 U. S. 254 (1964) 2, 7, 8, 11, 13, 17, 18, 19

Rosenblatt v. Baer, 383 U. S. 75 (1966) 12, 13

St. Amant v. Thompson, 390 U. S. 727 (1968) 12, 13, 18

Thornhill v. Alabama, 310 U. S. 88 (1940) 11

Time, Inc. v. Hill, 385 U. S. 374 (1967) 12, 13, 14

Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. 1969), cert. denied, 395 U. S. 922 (1969) 12, 14, 17

United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, 404 F. 2d 706 (9th Cir. 1968), cert. denied, 394 U. S. 921 (1969) 12, 14, 17

Washington Post Co. v. Keough, 365 F. 2d 965 (D. C. Cir. 1966) 19

CONSTITUTION AND CODE CITED.

Page

United States Constitution, First Amendment ..2, 11, 12, 13, 14, 17

28 U. S. C. § 1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 947

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is not yet reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 289 F. Supp. 737 (E. D. Pa. 1968). Both opinions are printed as appendices to the petition herein.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 15, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below correctly rejected the contention that the First Amendment protection defined by this Court in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) must be limited to factual situations in which the defamation plaintiff is a public official or a public figure.

2. Whether the court below correctly held that the evidence adduced by petitioner in this case failed to establish that the broadcasts in issue were made with actual malice or with a high degree of awareness of their probable falsity.

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE.

In 1962, Outdoor American Company, a publisher of several so-called "nudist" magazines, offered to petitioner Rosenbloom a distributorship which covered a substantial regional area from Atlantic City to Harrisburg and from Wilmington to Trenton (96a-97a).[1]

After some investigation (45a-97a), Rosenbloom accepted the distributorship and entered into the business on May 1, 1963 (179a). In six months, he had already obtained outlet accounts with sixty newsstands, drug stores, and other vendors (188a).

In the fall of 1963, the Philadelphia police began to receive complaints concerning the allegedly obscene and offensive nature of certain periodicals available at various newsstands throughout the city (259a-260a). Under the supervision of Captain Clarence Ferguson, an experienced officer who had participated in investigating alleged obscenity law violations for more than forty years (247a), the police began an investigation which ultimately focused on twenty-one particular newsstands. On October 1, 1963, the police began a series of arrests and confiscations later described by Captain Ferguson as "one of the largest raids in the City of Philadelphia" (249a).

George Rosenbloom was among the twenty-two individuals arrested on October 1. The other twenty-one were all newsstand dealers. Rosenbloom, the only distributor arrested, was supplying fifteen of the twenty-one dealers with his publications (99a).

Three days after his arrest and release on bail on October 1, the police rearrested Rosenbloom and seized a large supply of Outdoor American publications kept at his home and at a nearby rented barn (100a, 263a). By that time, October 4, the total number of arrests of dealers, dis-

1. References to "a" pages are to the printed appendix on appeal.

tributors and shippers of allegedly obscene periodicals had reached twenty-nine (99a-100a, 273a, 347a). Captain Ferguson notified the local news media, including Station WIP, a radio station managed and controlled by respondent, that he had uncovered the supply of "one of the main distributors for the City of Philadelphia of these obscene books" (251a).[2]

On October 1, 1963, the local newspapers, the radio and television stations, and the United Press Wire Service all began detailed and extensive coverage of the police investigation and arrests (211a-215a, 414a-415a). Rosenbloom's arrest was included in the media reports.

On October 4, 1963, Station WIP, managed and controlled by Metromedia, following the report to it that day by Captain Ferguson, made its first broadcast referring to Rosenbloom's arrest. By this time, Rosenbloom's name had been in the news since October 1 (211a-215a, 406a-407a). The arrest was one of seven items reported on the five-minute, six o'clock newscast. All of the news bulletins concerned events which had occurred that day. The Rosenbloom arrest was noted as having occurred "this afternoon" (350a-351a). The station relied on Captain Ferguson as the source of its information (290a). Ferguson had made reports frequently in the past and had always been found reliable and accurate (293a-294a).

Station WIP included the arrest item in eight of its twenty-eight five-minute bulletins given every half-hour over the following fourteen hours, the last reference occurring at 8:00 a.m., October 5. In those eight bulletins, WIP summarized seventy-two news items describing current

2. There is no basis in the record or in fact for the statement in the petition (p. 5) that Rosenbloom's arrest was "* * * fortuitious, since the campaign was directed not at his publications but at more lurid material." To the contrary, Captain Ferguson specifically described Rosenbloom to Station WIP as one of the major distributors of objectionable literature in the City (251a).

events of the day locally and throughout the world (350a-372a).[3]

The first and second broadcasts by WIP on October 4, 1963, beginning at 6:00 p.m., read as follows (350a):

> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

Rosenbloom's trial counsel conceded that the first and second sentences, which were true, and the fourth sentence, which was merely a report of a police officer's opinion, were not actionable (310a). The contention as to this set of broadcasts rested on the omission in the third sentence of the word "allegedly" before the word "obscene", on the apparent theory that this omission converted the third sentence into a statement of opinion by Station WIP (311a). The next six broadcasts in the series which began on October 4 and ended at 8:00 a.m. on October 5, 1963, included the word "allegedly" or "reportedly" in the third sentence reference to Rosenbloom's publications (350a, 368a).

On October 15, 1963, Rosenbloom, together with two publishers, began a lawsuit in federal court seeking injunc-

3. Station WIP broadcasts the news every half hour, twenty-four hours a day, seven days a week—a total of 336 broadcasts a week, each containing from five to twelve or more news items (58a, 288a).

tive relief and damages against the City of Philadelphia, the District Attorney, the Police Commissioner, The Evening Bulletin, Triangle Publications, Inc. (publisher of the Philadelphia Inquirer and the Philadelphia Daily News) and WCAU-TV, a local Columbia Broadcasting System television station (402a-418a). He claimed that the defendants had published stories on October 1, 2 and 3 falsely describing him as a dealer in smut and obscenity (211a-215a, 406a-407a). Rosenbloom did not name Station WIP as a defendant.

The district judge assigned to the case set October 21, 1963 as the date for argument on the defendants' motion to dismiss. Station WIP learned of the suit either through the wire service or as the result of individual calls (55a, 56a, 72a). On October 21, in an early morning broadcast, which covered twelve current news items in five minutes, Station WIP described the lawsuit and noted the hearing (369a-372a). Rosenbloom was not named in the broadcast. The station referred to the lawsuit, without mentioning Rosenbloom's name, in eight other broadcasts on October 21 (369a-392a). Station WIP also referred to the progress of the lawsuit in two bulletins on October 25 and one again on November 1, 1963, all without reference to the identity of the plaintiffs in the action (303a-401a). The broadcasts ranged from ninety seconds to ten minutes in length and covered as many as eighteen different local, national, and international news items.[4]

Rosenbloom's suit for damages was based on the first two of the series of broadcasts made on October 4th and

4. The petition for certiorari erroneously states (p. 6) that the second series of broadcasts, which began on October 21, referred to Rosenbloom as a "girlie-book" or "smut" peddler. As noted above, no one of the second series of broadcasts referred to Rosenbloom by name. Further, there was no evidence produced at the trial to establish that any member of the public understood that this series of broadcasts referred to Rosenbloom.

5th and on the series of broadcasts beginning on October 21 with reference to the court proceeding against the City of Philadelphia, Philadelphia officials and various news media. At the conclusion of the trial, the District Judge declined to view the case as appropriate for the application of the principles of *New York Times v. Sullivan*, 376 U. S. 254 (1964) as a limitation on the right of Rosenbloom to recover. Metromedia's motion for a directed verdict (241a) and for a binding instruction (427a) were denied. Instead, the jury was instructed to consider the case under the principles of Pennsylvania defamation law (324a-334a). The jury was instructed that the state law of defamation extended a privilege to Station WIP to report certain news events conditioned on reasonable conduct in making the report and the use of reasonable diligence to determine the accuracy of the broadcasts (325a-327a). On the question of punitive damages, the jury was instructed that punitive damages could be awarded if the broadcasts resulted "* * * from a bad motive or malice toward the plaintiff * * *" or were published "* * * with reckless indifference to the truth * * * or with reckless disregard to the rights of others or reckless indifference to the rights of others * * *" (333a). The jury returned a verdict in favor of Rosenbloom for $25,000 actual damages and $725,000 punitive damages (343a). The District Judge reduced the punitive award to $250,000 on remittitur (458a).

After the jury had returned its verdict, the trial judge again rejected the contention that the principles of the *New York Times* case controlled the case and denied alternative motions for judgment n.o.v. or for a new trial (442a, 457a). In connection with the denial of these motions, the trial judge filed an opinion (435a-456a).

The Court of Appeals reversed the district court and held that Rosenbloom should have been required to meet

the "actual malice" standard of proof formulated in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The court emphasized two distinct and separate factors in its decision: (1), that the subject matter of the broadcasts was of legitimate and established public interest; and (2), that the broadcasts were of "hot news", reported under conditions where, as the court said, "it is not realistic to require thorough research or verification of each individual item" (Pet., pp. 20-22).

Having determined that the *New York Times* principle should have been applied, the Circuit Court then reviewed the record to determine whether the plaintiff had produced "convincingly clear" evidence that Station WIP had made the broadcasts with a "reckless disregard of the truth" (Pet., pp. 24-26). As already noted, the District Judge had declined to charge the jury that the *New York Times* principle was applicable to the case. In sustaining the award of punitive damages, the evidence most heavily relied upon by the District Judge concerned Rosenbloom's brief conversation with a part-time employee at Station WIP (Pet., pp. 40-44). On this basis, the District Judge concluded that there was "* * * a recklessness of conduct as to the rights of others sufficient to warrant punitive damages." (Pet., p. 44).

The actual occurrence was as follows. On October 26 or 27, Rosenbloom visited Station WIP to find out if WIP had, in fact, been making broadcasts about him and, if so, what they were (133a-137a). He spoke to a part-time newscaster on an inter-office telephone and specifically requested that the noon broadcast of October 21 be read to him (137a). After the broadcast was read to him, Rosenbloom stated that the magazines had been "* * * found to be completely legal and legitimate by the United States Supreme Court" and that he possessed a statement by the Philadelphia District Attorney that his magazines were "* * * completely

legal • • •'" (137a-138a).[5] The newscaster replied that the District Attorney had said that the magazines involved in the federal court suit and referred to in the October broadcasts were obscene (137a). After this exchange, "• • • the telephone conversation was terminated. • • • He [the newscaster] just hung up." (138a).

In considering whether there was constitutionally sufficient evidence to sustain a jury verdict in favor of Rosenbloom, the Court of Appeals examined this so-called retraction incident. The Court of Appeals stated (Pet., p. 25):

> "• • • We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best . . . We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards."[6]

The Court of Appeals next noted that Station WIP could not be expected to make thorough investigations of

5. The petition for certiorari (pp. 4, 5) follows the line, also pressed in the court below, that there is some relationship between the issue in this case and the fact that, at a time long subsequent to the date of the broadcasts here involved, Rosenbloom's magazines were held not to be obscene in a criminal proceeding. It is obvious, we submit, that there is no such relationship.

6. Rosenbloom's visit to Station WIP took place on October 26 or 27, after all but one of the broadcasts here involved had occurred (133a-135a). The only remaining broadcast, that of November 1, is conceded to be accurate. It should be noted that, during the course of trial, no witness was produced by the plaintiff who had heard either of the series of broadcasts and there was, accordingly, no evidence that any member of the public understood the second series of broadcasts to refer to Rosenbloom.

"hot news" items, and that, in holding to the contrary, the district court had placed an improper burden on the station (Pet., pp. 25-26). As the court had earlier observed, the primary value of "hot news" to the public lies in conveying the latest news as promptly as possible so that the public may be informed of news items of immediate public concern. Station WIP had received the story from a police officer who had always been reliable in the past and the station had no reason to doubt the accuracy of his report.

Finally, the Court of Appeals noted that the district court, in sustaining the punitive damage award, had characterized "highly inflammatory references" in the second series of broadcasts as evidence of a reckless disregard of plaintiff's rights and observed that (Pet., p. 26):

> "It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity".

The Court of Appeals thus concluded that the evidence was constitutionally insufficient to support a judgment for the plaintiff, and that the district court should have granted defendant's motions for judgment (Pet., p. 26).

ARGUMENT.

A. The Court of Appeals Decision Is Clearly Correct in Applying the Protective Principles of the *New York Times* Case to the Broadcasts at Issue.

In holding that the broadcasts at issue here concerned matters of substantial public interest and therefore were entitled to the First Amendment protection defined in the *New York Times* case, the Court of Appeals correctly applied the basic proposition recognized by this Court that "freedom of expression upon public questions is secured by the First Amendment." See *New York Times*, 376 U. S. at 269; *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940). There is no need for this Court to review that fundamental constitutional proposition merely because it has now been applied by the Court of Appeals to factual circumstances inevitably differing in immaterial particulars from the cases in which the proposition has been recognized. The proposition can not be questioned, and its application in this case is entirely consistent with and supported by the decisions in which the nature and scope of the constitutional principles have been defined.

Petitioner insists, however, that this Court has never actually applied the *New York Times* constitutional protection to defamatory statements about individuals who are neither "public officials" nor "public figures". Literally, the statement is accurate, primarily because the Court has never had that particular set of facts before it for decision in a defamation context. But this literal accuracy does not in any way detract from the correctness of the decision below, or create a need for review by this Court. On two recent occasions, the same contention—that the protective principle of the *New York Times* case must be restricted

to factual situations in which the defamation plaintiff is a public official or a public figure—has been unsuccessfully presented to this Court. *Time, Inc. v. McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems,* 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969).

In the *New York Times* case, in *Curtis Publishing Co. v. Butts,* 388 U. S. 130 (1967), in *Associated Press, Inc. v. Walker,* 388 U. S. 130, 155 (1967), and in *Time, Inc. v. Hill,* 385 U. S. 374 (1967), this Court has explained the basis for the First Amendment protection at issue with sufficient clarity to allow the lower courts to apply the principle in different factual contexts. As the Supreme Court has already suggested, case-by-case evolution must mark the outer limits of the *New York Times* doctrine. *St. Amant v. Thompson,* 390 U. S. 727, 730 (1968). It could hardly be suggested that this process, which will be developed by the endlessly differing circumstances in which defamation actions may arise, must be conducted exclusively by the Supreme Court. Where the constitutional principles are clear and the analytical procedures have been specifically described, it is most appropriate that the lower courts map out the factual boundaries of a constitutional doctrine.

Perhaps the simplest authoritative statement of the Supreme Court's application of First Amendment protection to defamatory statements may be found in *Rosenblatt v. Baer,* 383 U. S. 75, 85, fn. 10 (1966), where Mr. Justice Brennan observed that

> "... the public interests protected by the *New York Times* rule are interests in discussion, not retaliation ... *the scope of the privilege is to be determined by reference to the function it serves* ...." (Emphasis added.)

The issue is to determine what function the First Amendment privilege serves in a particular case. In the *New York Times* case, in *Butts*, in *Walker*, and in *Hill*, as well as in the case presently before the Court, the function served was to provide the public with information on matters in which it had a legitimate and substantial interest. If the plaintiff in a particular case occupies a position of some "public" status, the public may have a legitimate and substantial interest in statements about him solely for that reason. But this would merely be an incidental aspect of the broader base of the First Amendment protection, the right to inform the public on matters of legitimate public interest, not the basis for a mechanically restrictive rule.

In this case, the public interest lay in Rosenbloom's substantial involvement in various police investigations, and in his court suit against the City and its news media. The public had a legitimate interest in his activities whether or not he had theretofore been a person of public prominence. Because the First Amendment privilege as applied to these broadcasts would thus serve the same function, *i.e.*, informing the public on matters in which it has a legitimate interest, as it served in *New York Times*, *Butts*, *Walker*, and *Hill*, the privilege must be given the scope declared necessary by this Court in those cases.

The lower courts participating in the case-by-case evolution foreshadowed by this Court in *St. Amant*, have consistently understood that the "public issue" test is constitutionally and logically demanded by the protective principles fashioned in the *New York Times* case and by the analytical approach defined in *Rosenblatt*. Recognizing that the public interest in the statements at issue was the basis for the grant of constitutional protection in the *New York Times* case, in *Garrison v. Louisiana*, 379 U. S. 64, 74-75 (1964), in *Butts*, 388 U. S. at 150-152, and in *Walker*, 388

U. S. at 155, and the clear holding of this Court in *Time, Inc. v. Hill,* 385 U. S. 374, 387-388, both the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit have explicitly recognized the inevitable applicability of the public interest test in a defamation context. In each case, this Court denied certiorari. See *Time, Inc. v. McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems,* 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969). Other courts have also recognized that the "public official" and "public figure" cases in this Court were but specific applications of the broader constitutional principles upon which those decisions are founded, and consequently have not viewed the status of the plaintiff as critical but have accepted and applied the "public issue" basis for application of the First Amendment privilege. See *Bon Air Hotel, Inc. v. Time, Inc.,* 295 F. Supp. 704 (S. D. Ga. 1969); *All Diet Food Distributors, Inc. v. Time, Inc.,* 290 N. Y. S. 2d 445 (N. Y. Sup. Ct. 1967); *Fotochrome, Inc. v. New York Herald Tribune, Inc.,* (Sup. Ct. of N. Y., Queens County, decided October 24, 1969, Index #12784/65); *Farnsworth v. Tribune Company* (Sup. Ct. of Ill.), decided November 26, 1969, No. 41699. These cases all conform to the principles and analysis announced by this Court and are further evidence of the correctness of the decision of the court below in applying the "public issue" test to this case.

It is clear, then, that the Court of Appeals has here applied the proper protective principles to this case. However, it may be useful to the Court for respondent to summarize briefly the nature of the public interest in the WIP broadcasts. It is also necessary to dispel the inaccurate impression created by the petition that Rosenbloom was not a person of legitimate interest to the public before the news media reports were published.

It is no doubt true that Rosenbloom did not desire to have the public learn that he had been arrested for selling obscene literature. The petition is also reasonably accurate in describing Rosenbloom as "unknown to the public" prior to WIP broadcasts. However, it is *not* true that Rosenbloom was "of no interest" to the public, nor is the petition accurate in stating (p. 9) that such interest as the public may have had was manufactured by the misrepresentations of the news media.

Rosenboom had entered into a business where his success depended upon his ability to sell Outdoor American's nudist literature to the public. Regardless of its legality, the product which he chose to sell was inevitably controversial in nature. Nudity on sale at public newsstands may not be obscene under current legal standards, but it is certainly controversial. Indeed, Rosenbloom was aware of the risk in his business. Outdoor American offered the distributorship of its publications to Rosenbloom in the summer of 1962 but Rosenbloom did not accept until May, 1963 (96a-97a). In the interim, Rosenbloom retained a lawyer to investigate the legality of the magazines and their publisher (95a-97a).

Vendors in the public market depend upon some public approbation for their success, and likewise must accept some public disapprobation as a risk of their business. In this case, some members of the public objected to Rosenbloom's periodicals. They complained to the police. The police investigated, and agreed with the complaining members of the public. They began an extensive crackdown on controversial nudist literature. They arrested Rosenbloom and fifteen of the newstand dealers whom he supplied, later rearrested Rosenbloom and seized his periodicals, and identified him as one of the major sources of obscene literature in the city. Thus, Rosenbloom had become of interest to the public before any media reports. The media merely

communicated to the public the events in which the public had a legitimate interest.

Rosenbloom then took the offensive and brought a dragnet lawsuit. He sued the City, the Police, the District Attorney, the newspapers, a television station—but not Station WIP. He asked for a million dollars in damages from the City Treasury and from the news media. Here, again, was a matter of legitimate public interest.

Yet petitioner argues that, even after the arrest, the rearrest, and the confiscation of the magazines,[7] the public interest in the WIP broadcasts was "kindled chiefly by the misrepresentations of the media." It is obvious that WIP had no part in Rosenbloom's becoming a distributor of nudist magazines; nor did it investigate or arrest him or confiscate his magazines; nor did it force him to sue the City and the other news media. Rosenbloom did some of these things, and some of these things were done to him as a result of his involvement in a "purposeful activity" —selling controversial nudist literature—and he thereby "thrust . . . his personality into the 'vortex' of an important public controversy." *Associated Press v. Walker*, 388 U. S. at 155.

Thus, Rosenbloom became inextricably involved in matters of public interest. His connection with matters of public interest effectively destroyed the existence of and the right to that anonymity upon which he now rests his right to recover damages. All Station WIP did was report to the public the matters of public interest in which Rosenbloom had become involved. WIP did not create those matters or that involvement.

In summary, the Court of Appeals in this case has simply applied the constitutional principles delineated by

---

7. The first WIP broadcast mentioning Rosenbloom did not occur until *after* the second arrest and the confiscation.

this Court in *New York Times* and the cases following it to a set of facts inevitably different from the particular facts considered by the Court in those cases. The factual differences are not of constitutional significance. Here, as in the *McLaney* case and the *United Medical* case, the protective First Amendment principles at issue have been correctly interpreted and applied.

B. There Is No Need for This Court to Review the Court of Appeals Decision That There Was No Constitutionally Sufficient Evidence of Actual Malice to Support a Judgment for Petitioner.

The second of petitioner's "Reasons for Granting the Writ" assumes a holding by this Court that the Court of Appeals was correct in applying the protective principles of *New York Times* to this case. Essentially, petitioner simply argues that the evidence of "actual malice" was sufficient to support a judgment for petitioner at trial. He asks this Court to review the Court of Appeals' decision in order to determine the correctness of the appellate court's evaluation of the evidence in the record. In this connection, petitioner makes the curious argument that the conclusion reached by the Court of Appeals after careful examination of all the evidence would be changed by an "additive" consideration of the same evidence (Pet., p. 15).

The procedure followed below in assessing the evidence was clearly correct. The Court of Appeals examined the record to determine, in the words of this Court, whether there was:

> ". . . sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts

as to the truth of his publications." *St. Amant v. Thompson,* 390 U. S. at 731 (1968).

In analyzing the evidence presented at trial, the Court of Appeals evaluated each separate evidentiary item to determine its constitutional sufficiency, exactly as this Court did in the *New York Times* case, 376 U. S. at 286-292. The Court of Appeals found that the "retraction" incident, which occurred after all but one of the broadcasts had been made, was of dubious value "at best" with respect to the earlier broadcasts, and thus could not provide evidence of defendant's "serious doubts as to the truth" of the publications with the requisite "convincing clarity" demanded by this Court. The one broadcast following the retraction incident was conceded to be entirely accurate.

Having rejected the retraction evidence as insufficient, the Court of Appeals emulated this Court in the *New York Times* decision (376 U. S. at 287-288) and considered the evidence of WIP's failure to investigate the truth of the broadcasts. Noting again that Station WIP had not been put on notice of any inaccuracy in its reports until the next to last broadcast, and that the last report was accurate, the Court of Appeals concluded that the "hot news" service provided by Station WIP in frequently reporting important current developments was important to the public and protected by the First Amendment, that the Station had relied on Captain Ferguson, always accurate in the past, and that the investigatory burden suggested by the district court was not constitutionally permissible. The proposition that full investigation cannot be expected in reporting "hot news" has already been suggested by this Court in *Associated Press v. Walker,* 388 U. S. at 157. Further, this Court has repeatedly held that investigatory failures are not sufficient evidence of a reckless disregard of the truth. *St. Amant v. Thompson,* 390 U. S. at 733;

Beckley Newspapers v. Hanks, 389 U. S. 81, 84 (1967); *Curtis Publishing Co. v. Butts*, 388 U. S. at 153; *New York Times v. Sullivan*, 376 U. S. at 286.

The Court of Appeals then noted in conclusion that the "inflammatory" language of the broadcasts could hardly be probative of WIP's "degree of awareness of their probable falsity," *Garrison v. Louisiana*, 379 U. S. at 74. As has been recently held by the Court of Appeals for the District of Columbia, ". . . the seriousness of a charge, in itself, is not probative of recklessness with respect to the truth." *Washington Post Co. v. Keough*, 365 F. 2d 965, 970 (D. C. Cir. 1966).

Thus, it is clear that in reviewing the evidence to determine its constitutional sufficiency, the Court of Appeals correctly applied the principles and the analytical techniques established by this Court. There is no need for further review of the evidence itself.

Petitioner further argues (Pet., p. 15) that "the jury to all practical effect made a finding of actual malice in awarding punitive damages" under Pennsylvania state law. The importance of precise instructions in a case involving the *New York Times* principle was emphasized by this Court in *Butts*, where Chief Justice Warren warned (388 U. S. at 166):

> "Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established . . . ."

Here, the jurors were instructed on state law *only;* they were never made aware of the First Amendment protection to which Station WIP was entitled; they were never instructed that plaintiff had to prove that defendant had "in fact entertained serious doubts as to the truth" of the broadcast. Instead, the jurors were charged that they might

predicate punitive damages upon defendant's "ill will" toward the plaintiff, or "* * * from a bad motive or malice toward the plaintiff * * * or reckless disregard of * * * or reckless indifference to the rights of others * * *" (333a). The findings of a misinformed, erroneously instructed jury could hardly be considered probative with respect to the very issue upon which the jury was improperly charged.

CONCLUSION.

The decision of the court below is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102,

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,

COUDERT BROTHERS,
200 Park Avenue,
New York, N. Y. 10017,

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

Of Counsel.

January 9, 1970.